(2)

No. 06-207

In the Supreme Court of the United States

ALFONZO INGRAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether due process required the district court to exclude the testimony of a cooperating witness, where the government agreed to pay the witness a percentage of the proceeds from drug sales forfeited as a result of his cooperation.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 19-20) is not reported in the *Federal Reporter* but is reprinted in 170 Fed. Appx. 974. The opinion of the district court (Pet. App. 27-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2006. A petition for rehearing was denied on May 9, 2006 (Pet. App. 31). The petition for a writ of certiorari was filed on August 7, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois of conspiracy to attempt to possess cocaine, in

violation of 21 U.S.C. 846 and 841(a)(1). Pet. App. 1, 27. He was sentenced to 300 months of imprisonment, to be followed by five years of supervised release. Pet. App. 1. The court of appeals affirmed the conviction, but ordered a limited remand in light of *United States* v. *Booker*, 543 U.S. 220 (2005), allowing the district court to determine whether it would have imposed its original sentence if it had understood that the Sentencing Guidelines were advisory. Pet. App. 1-18. While the remand was pending, the United States filed a petition for rehearing, and the court of appeals entered a supplemental opinion. *Id.* at 21-26. On remand, the district court determined that it would have imposed the same sentence under an advisory Sentencing Guidelines regime. The court of appeals affirmed. *Id.* at 19-20.

1. In 1990, Oscar Diaz arrived in the United States illegally, and began trafficking in large quantities of cocaine, as well as heroin and marijuana. Tr. 168, 171-173. In 2001, Pierre Dawson, himself a large-scale cocaine dealer in Memphis, Tennessee, met Diaz and discussed making a significant purchase of cocaine. Tr. 185-188, 204. Diaz and Dawson initially could not agree on a mutually acceptable price, but in August 2001, Diaz sold Dawson 50 kilograms of cocaine at a price of $19,000 per kilogram. Tr. 202-203, 211-214. Between August 2001 and December 23, 2001, Diaz made approximately seven to nine additional sales of cocaine to Dawson, each of which involved at least 100 kilograms of cocaine. Tr. 219-220. In one deal involving 150 kilograms, Dawson personally delivered more than $2 million to Diaz in a hotel room in Memphis. Tr. 249-251. The drugs were then delivered to Memphis by an 18-wheel truck from Texas. Tr. 221-225.

As part of the last deal during that period, on December 23, 2001, petitioner met with Diaz and Dawson at a hotel in Memphis. Later that day, Diaz and the driver of the 18-wheel truck arrived at a warehouse where they met Dawson, petitioner, and two other men. They loaded 283 kilograms of cocaine into a car, and petitioner drove the vehicle away. Tr. 251-259.

2. In April 2002, Officer Jeff Marran of the drug task force in Palos Heights, Illinois, approached Diaz to gauge his interest in cooperating with the Drug Enforcement Administration (DEA) by providing information about drug dealers, making surreptitious recordings, and testifying in court. Tr. 267-269. Officer Marran informed Diaz that, in exchange for his cooperation, he could receive money for the information he provided, as well as a fee of up to 20% of any drug-related proceeds seized and forfeited by the government as a result of his cooperation. Tr. 456; Pet. App. 2. See 21 U.S.C. 886(a) (authorizing the attorney general "to pay any person, from funds appropriated for the Drug Enforcement Administration, for information concerning a violation of this subchapter, such sum or sums of money as he may deem appropriate"). Officer Marran also assured him that, if he continued cooperating and "telling the truth," he would not be prosecuted for his past drug dealing. Tr. 267. Diaz accepted Officer Marran's offer. Tr. 269.

At the time of his recruitment, Diaz had an application for United States citizenship pending. In his application, Diaz answered "no" to a question asking whether he had committed any crimes. Diaz later informed the lead case agent about his application, and acknowledged that he had misrepresented his criminal history. The DEA neither assisted Diaz in obtaining citizenship nor

attempted to block his application. Diaz eventually became a citizen in 2002. Pet. App. 2-3; Tr. 168, 170.

Diaz grossed more than $1 million dealing drugs. Tr. 185. Although he filed tax returns for 1999, 2000, and 2001, he failed to list his drug profits as income. Tr. 490-492. He also failed to pay $12,000 in income taxes for 2002, based not only on his drug profits but on money he received from the government pursuant to his agreement to assist the DEA. See Tr. 463-465, 489-490.

3. Between April 30, 2002, and July 12, 2002, Diaz participated in a series of conversations with Dawson, two of which also involved petitioner. Unbeknownst to petitioner and Dawson, Diaz possessed a device that enabled DEA Special Agents to hear and record his conversations. Tr. 270-287, 396.

On July 12, 2002, petitioner and Dawson twice met with Diaz. Tr. 395-398. At the first meeting, which took place at a Walgreens store in Chicago, Dawson and Diaz spoke together for approximately 2-3 minutes when petitioner arrived. Tr. 286, 397-401. Dawson asked whether Diaz remembered petitioner, and Diaz responded that he recalled petitioner from the hotel, as part of the 283-kilogram deal in December 2001. Tr. 401-402. At the second meeting, Diaz met Dawson and petitioner in Diaz's garage to complete a purchase. Tr. 410-411. Dawson and Diaz confirmed that the sale would involve 38 kilograms of cocaine, and Dawson began to count out money he had brought along in a suitcase. Tr. 412. When Diaz said that counting the money was unnecessary, petitioner replied, "I just want you to know it's all here." Tr. 416. Shortly thereafter, DEA agents entered the garage, arrested petitioner and Dawson, and seized $269,000 in intended proceeds from the sale. Tr. 181, 410-416.

4. On November 19, 2002, a federal grand jury in the Northern District of Illinois returned a two-count indictment charging petitioner and Dawson with conspiracy to possess with intent to distribute and to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. 846 and 841(a)(1) (Count 1), and attempt to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. 846 and 841(a)(1) (Count 2). Indictment 1-2. The case proceeded to trial and Diaz testified for the government, in part to authenticate the tapes of his recorded conversations with Dawson and petitioner. See Pet. App. 5.

Cognizant of the Seventh Circuit's "general position with regard to admission of testimony of an informant who has a contingent fee arrangement with the government," which is "to allow the jury to consider such an arrangement in its evaluation of the witness's credibility," *United States* v. *Estrada*, 256 F.3d 466, 471 (2001), the district court permitted defense counsel to cross-examine Diaz at length about the money he had received to date, the money he stood to receive, and the general terms of his arrangement with the DEA. See Pet. App. 16. Diaz admitted that he had agreed to exchange "money for information," and that he would be financially "compensated for the information that I provide to the government." Tr. 456-457. Specifically, he admitted that he could receive "up to 20 percent of the seizure," which in this case meant almost $54,000. Tr. 457, 487. Diaz further admitted that he had already received $113,000 for information and expenses, and that he failed to pay income taxes on those payments because he "spent all the money." Tr. 458-461, 465.

In its instructions to the jury, the district court called attention to the fact that Diaz "received certain

benefits from the government in connection with this case and others as a result of his cooperation with the government." Jury Instructions 17. The court admonished the jury to "give his testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care." *Ibid.*

The jury found petitioner guilty on Count 1, but acquitted him on Count 2. Pet. App. 27. It found Dawson guilty on both counts. *Ibid.* The district court denied both defendants' post-verdict motions for judgments of acquittal, concluding that "the evidence against both defendants was damning," and "far more than adequate to justify the jury's decision" to convict petitioner of conspiracy. *Id.* at 28. Petitioner also sought a new trial on the ground that the district court erred in admitting Diaz's trial testimony in light of his "contingent fee" arrangement with the government. In denying the motion, the district court found "no authority for the proposition that contingent reward arrangements with cooperating witnesses are a miscarriage of justice." *Id.* at 29. The court noted that the Seventh Circuit "has voiced some concern about the practice, but has refused to overturn convictions based on contingent-fee witness testimony." *Ibid.* (citing *Estrada*, 256 F.3d at 471-472).

5. The court of appeals affirmed petitioner's conviction. Pet. App. 1-11.

a. Writing for the panel majority, Judge Posner rejected petitioner's argument that the district court should have excluded Diaz's testimony because of the benefits he received in exchange for his cooperation.

First, the court of appeals disagreed with petitioner's characterization of Diaz's agreement as a "contingent fee for his testimony." Pet. App. 4-5. Federal law prohibits any person from "paying witnesses (other than

experts) for their testimony (beyond the tiny fees permitted [under 28 U.S.C. 1821])." Pet. App. 5-6 (citing 18 U.S.C. 201(c)(2)). Under Diaz's agreement, however, the 20% fee "was paid whether or not Diaz testified," and Diaz "usually earned the bounty without having to testify" because most criminal cases, including forfeiture cases, settle before trial. *Id.* at 5. The court of appeals therefore described the arrangement as a kind of "bounty," or "a reward for rendering a service that the offeror wants done." *Ibid.* Rather than a flat fee, the government simply chose to offer "a percentage of the money that the government recovered from the offenders," thereby "giv[ing] the bounty hunter an incentive to concentrate on the biggest prey." *Ibid.* Moreover, the court noted, even a violation of the statutory prohibition against paying a witness for testimony does not necessarily require exclusion of testimony. See *id.* at 6 ("Exclusion confers windfalls on the guilty."). Under these circumstances, "[a]n exclusionary rule would be not only costly but also gratuitous * * * because a jury should be competent to discount appropriately testimony given under a powerful inducement to lie." *Ibid.*

Second, the court of appeals declined to adopt a "*general* policy (whether enforced by exclusion or by some other means) against giving a witness inducements to testify." Pet. App. 7. In any dispute, the parties themselves have "an interest, pecuniary or otherwise, in the outcome," yet courts long ago abandoned "the old rule" that parties are not sufficiently "disinterested" and may not testify on their own behalf. *Ibid.* The court noted that testimony by cooperating witnesses in drug prosecutions "is frequently indispensable," and that Diaz's testimony in particular "was amply corroborated, and not only by the recordings." *Ibid.* The court

of appeals also expressed concern about its institutional competence to second-guess the government's choice of inducements in the exercise of its prosecutorial discretion to combat drug trafficking. *Id.* at 8. Instead, the court reiterated that its objective is "to make sure that grossly unreliable evidence is not used to convict a defendant," and that it can accomplish that objective "by requiring (in effect) that the inducements be disclosed to the jury, which can use its common sense to screen out evidence that it finds to be wholly unreliable because of the inducements that the witness received." *Ibid.*

b. Judge Williams dissented. Pet. App. 12-18. In her view, Diaz's agreement with the government left him "financially motivated in the conviction of the defendants" and therefore violated petitioner's right to a fair trial. *Id.* at 12. Although she acknowledged that the government can offer a range of incentives, including immunity or reduced sentences, in exchange for truthful testimony, she concluded that the opportunities for abuse inherent in Diaz's agreement, whether characterized as a contingent fee or a bounty, "renders any percentage of moneys paid to a witness improper." *Id.* at 17-18.[1]

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[1] Because the sentencing in these cases occurred before *Booker*, *supra*, the court of appeals, following its precedent, see *United States* v. *Paladino*, 401 F.3d 471, 483-484 (7th Cir. 2005), ordered a limited remand to allow the district court to determine whether it would have imposed its original sentence if it had understood that the Sentencing Guidelines were advisory. Pet. App. 11. During the pendency of the remand, the government filed a petition for panel rehearing, seeking clarification of a portion of the decision relating to a separate evidentiary issue resolved on appeal. On January 17, 2006, the court of appeals issued a decision addressing the government's petition. *Id.* at 21-26. Thereafter, the district court entered an order stating that it "would have imposed the same sentences" if it had known that the

c. On March 31, 2006, both petitioner and Dawson petitioned the court of appeals for rehearing with suggestions for rehearing en banc. Judge Williams voted to grant the petitions, but the panel majority voted to deny them. No other judge on the Seventh Circuit requested a vote on the petitions for rehearing en banc. Pet. App. 31 & n.*.

ARGUMENT

Petitioner contends (Pet. 7-13) that Diaz's testimony violated his constitutional right to a fair trial because Diaz's compensation agreement with the government created an intolerable risk of perjury. Every court of appeals to consider that claim ultimately has rejected it. Petitioner has identified no conflict between the decision below and any decision of this Court or another court of appeals. Further review is not warranted.

1. In *Hoffa* v. *United States*, 385 U.S. 293 (1966), this Court recognized that our criminal justice system "ha[s] countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly." *Id.* at 311 (quoting *United States* v. *Dennis*, 183 F.2d 201, 224 (2d Cir. 1950) (L. Hand, J.), aff'd, 341 U.S. 494 (1951)). The individuals best qualified to testify about criminal activity "are routinely either in conspiracy with the defendants or at risk of harm because they bore witness to criminal conduct." *United States* v. *Levenite*, 277 F.3d 454, 461 (4th Cir. 2002). Encouraging such witnesses to testify presents serious difficulties

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Sentencing Guidelines were advisory, and the court of appeals affirmed the sentences on March 17, 2006. *Id.* at 19-20.

for law enforcement officials, as "few would engage in a dangerous enterprise of this nature without assurance of substantial remuneration." *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329, 1338 n.19 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978).

Prosecutors therefore induce witnesses to cooperate by offering two kinds of incentive. First, they offer leniency. "[I]t has long been recognized that grants of immunity, plea agreements, and sentencing leniency are appropriate tools for use in the criminal justice system," as the Federal Rules of Criminal Procedure explicitly recognize. *Levenite*, 277 F.3d at 461-462 (citing Fed. R. Crim. P. 11(e) (2001)). The federal Sentencing Guidelines, for example, expressly contemplate a downward departure for criminal defendants who "provide[] substantial assistance in the investigation or prosecution of another person who has committed an offense." Sentencing Guidelines § 5K1.1.

Second, in some cases, they offer money. Federal law grants law enforcement officials broad discretion to compensate cooperating witnesses for information concerning criminal offenses. Some statutes authorize the payment of minor expenses, see 28 U.S.C. 1821, while others authorize the payment of major expenses and costs, see 18 U.S.C. 3521(b) (authorizing the payment of expenses for witnesses under relocation and protection statute); 18 U.S.C. 3195 (authorizing payment of all "fees and costs of every nature" involving extradition). Still others expressly authorize the payment of cash rewards to cooperating witnesses. See, *e.g.*, 21 U.S.C. 886(a) (authorizing the Attorney General to pay "any person," for information concerning violations of federal drug laws, "such sum or sums of money as he may deem appropriate, without reference to any moieties or re-

wards to which such person may otherwise be entitled by law").[2]

This Court has never questioned the admissibility of informants' testimony based on such incentives. In *Hoffa*, federal officials told Edward Partin, a Teamsters official on bail for state criminal charges and under a federal indictment, that Teamsters president Jimmy Hoffa might attempt to tamper with the jury at his upcoming trial in Nashville, Tennessee. 385 U.S. at 298. They encouraged Partin to "be on the lookout" and to "report to the federal authorities any evidence of wrongdoing that he discovered." *Ibid.* Partin agreed, and eventually testified against Hoffa, giving a first-hand account of the union leader's attempts to bribe the jury at his Nashville trial. *Id.* at 296 & n.3. Thereafter, "Partin's wife received four monthly installment payments of $300 from government funds, and the state and federal charges against Partin were either dropped or not actively pursued." *Id.* at 298.

On appeal, Hoffa argued that the admission of Partin's testimony rendered his trial fundamentally unfair and violated due process because "the risk that Partin's testimony might be perjurious was very high." 385 U.S. at 311. This Court acknowledged that "Partin, perhaps even more than most informers, may have had motives to lie." *Ibid.* Nonetheless, "it does not follow

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[2] See also 18 U.S.C. 1751(g) (authorizing payments for "information and services" concerning violations of statute prohibiting the assassination of the President); 18 U.S.C. 3056(c)(1)(D) (authorizing Secret Service to pay "rewards for services and information" assisting the Secret Service in its law enforcement efforts); 19 U.S.C. 1619(a) (authorizing rewards for "information" about violations of custom laws); 26 U.S.C. 7623 (authorizing payments deemed necessary to detect and prosecute tax offenders).

that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible." *Ibid.* Emphasizing that "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury," this Court found the procedural safeguards at trial adequate, and upheld the conviction. *Id.* at 311-312.

Since *Hoffa*, this Court has continued to address the "'serious questions of credibility' informers pose" by ensuring that various procedural safeguards allow criminal defendants to vigorously challenge the testimony of cooperating witnesses. See *Banks* v. *Dretke*, 540 U.S. 668, 701 (2004) (quoting *On Lee* v. *United States*, 343 U.S. 747, 757 (1952)). First, this Court has held that due process requires full disclosure of the terms of any agreement with a cooperating witness to the defendant. See *Giglio* v. *United States*, 405 U.S. 150 (1972); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Second, defendants must enjoy "broad latitude to probe [informants'] credibility by cross-examination." *Banks*, 540 U.S. at 702 (quoting *On Lee*, 343 U.S. at 757). Third, this Court "ha[s] counseled submission of the credibility issue to the jury 'with careful instructions.'" *Ibid.* (quoting *On Lee*, 343 U.S. at 757). Fourth, the government may never knowingly sponsor or suborn perjury. *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). In evaluating challenges to the testimony of cooperating witnesses, lower courts have also considered the availability of evidence to corroborate the witness's testimony by "independent means." *Levenite*, 277 F.3d at 462.

In this case, all of those procedural safeguards were honored. Before trial, the prosecution fully disclosed

the nature of Diaz's agreement to petitioner, including the fact that Diaz could receive 20% of any amount recovered in forfeiture. See Tr. 456-457. Petitioner's attorney vigorously cross-examined Diaz about the agreement at trial, forcing him to admit to the jury that he stood to make almost $54,000, depending on the outcome. Tr. 457, 487. The district court instructed the jury to consider Diaz's testimony with "caution and great care" because of his deal with prosecutors. Jury Instructions 17. Nothing suggests that the government suborned or supported perjury. To the contrary, Diaz testified in large part to authenticate tape recordings of his conversations with petitioner and Dawson, Pet. App. 3, which greatly enhance the reliability of his testimony. As the court of appeals recognized, "Diaz's testimony * * * was amply corroborated, and not only by the recordings." *Id.* at 7. These safeguards gave the jury ample opportunity to assess the veracity and credibility of Diaz's testimony. Admission of his testimony did not violate petitioner's right to a fair trial.

2. Petitioner attempts to distinguish this case from "ordinary" informant cases (Pet. 3, 8-9) by noting that Diaz stood to gain a percentage of the amount forfeited, which depended in part on the outcome of the trial. No court of appeals embraces petitioner's argument, and several have explicitly rejected it. In *United States* v. *Gonzales*, 927 F.2d 139, 141 (3d Cir. 1991), the government promised a cooperating witness "a reward of up to 25% of the value of any forfeiture" obtained as a result of a reverse-sting drug operation. The Third Circuit rejected a due process challenge to admission of the witness's testimony at trial, finding itself "at a loss to understand what the government did that was outrageous." *Id.* at 144. It acknowledged that, although his

payment was not formally contingent on conviction, the witness "did have an interest in the result of this case" because of the relationship between the trial and the underlying forfeiture proceedings. *Ibid.* It nonetheless held that "[t]he method of payment is properly a matter for the jury to consider in weighing the credibility of the informant," and that the government's use of the witness at trial "did not create a due process problem." *Id.* at 144-145 (quoting *United States* v. *Hodge*, 594 F.2d 1163, 1167 (7th Cir. 1979)).

The First Circuit considered virtually identical facts in *United States* v. *Cresta*, 825 F.2d 538, 545 & n.3 (1987), cert. denied, 486 U.S. 1042 (1988), where a cooperating witness had received $53,000 in payments from the DEA, and "he expected to receive a potential maximum of $50,000 from the sale of [an ocean freighter], which was seized on the strength of information he provided" and was subject to forfeiture. The court found that the witness's testimony did not violate the defendant's right to a fair trial in light of "[t]he extent of the corroboration of [the witness's] testimony, plus the fact that the jury was fully informed of the nature of the agreement, the thorough cross-examination about the agreement, and the specific instructions admonishing the jury to weigh the accomplice's testimony with care." *Id.* at 546-547.

Other courts of appeals overwhelmingly have reached the same conclusion. See *United States* v. *Rey*, 811 F.2d 1453, 1456-1457 (11th Cir.) (declining to adopt a rule that, "absent justification or explanation, payment of an informer contingent upon obtaining the conviction of a specific person in itself violates due process"), cert. denied, 484 U.S. 830 (1987); *United States* v. *Persico*, 832 F.2d 705, 716-717 (2d Cir. 1987) ("The overwhelming

majority of courts, in assessing contingent fee arrangements with informants, have permitted the informant's testimony to be introduced at trial and have deemed the method of payment 'a matter for the jury to consider in weighing the credibility of the informant.'") (quoting *Hodge*, 594 F.2d at 1167), cert. denied, 486 U.S. 1022 and 488 U.S. 982 (1988); *United States* v. *Fallon*, 776 F.2d 727, 733 (7th Cir. 1985) ("Many cases have allowed the testimony of informers whose payment, whether it be leniency or cash, was contingent upon the beneficial results obtained by their testimony"); *United States* v. *Valle-Ferrer*, 739 F.2d 545, 547 (11th Cir. 1984) (per curiam) (rejecting a due process challenge where the government's key witness learned before trial that he would receive an additional $1000 per defendant convicted); *Reynoso-Ulloa*, 548 F.2d at 1338 & n.18 (declining to follow the rationale of *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962), overruled by *United States* v. *Cervantes-Pacheco*, 826 F.2d 310 (5th Cir. 1987) (en banc), and upholding a conviction in spite of testimony by a cooperating witness who was "to be paid a specific amount for each pound of heroin seized"); *United States* v. *Grimes*, 438 F.2d 391, 395 (6th Cir.) (holding that contingent fee agreements with witnesses do not violate due process, even if the fee is to be paid "for the conviction of a specified individual"), cert. denied, 402 U.S. 989 (1971).[3]

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[3] Courts of appeals also have upheld cooperating witness fees closely analogous to Diaz's agreement with the DEA. See *Levenite*, 277 F.3d at 463-464 (rejecting a due process challenge to testimony by a witness who was eligible for a reward of up to $100,000, at the discretion of the FBI, based on the extent of his cooperation "in attaining the objectives of the investigation"); *Perisco*, 832 F.2d at 716-717 (upholding a conviction where "the FBI would determine the amount of payment" to

Contrary to petitioner's suggestion (Pet. 8), the decision of the court of appeals does not conflict with the views of the Eighth Circuit. A panel of the Eighth Circuit briefly held that any offer of favorable treatment to a witness "contingent upon the success of the prosecution" violates due process, *United States* v. *Waterman*, 732 F.2d 1527, 1531 (1984), cert. denied, 471 U.S. 1065 (1985), but the court granted rehearing en banc and ultimately affirmed the conviction by an equally divided court, *id.* at 1533. The panel opinion has no precedential value. *United States* v. *Spector*, 793 F.2d 932, 936 (8th Cir. 1986), cert. denied, 479 U.S. 1031 (1987). Similarly, a divided panel of the Fifth Circuit once adopted a per se rule that testimony by informants operating under a "contingent fee agreement" with the government is inadmissible as a matter of due process, see *Williamson*, 311 F.2d at 444, but the rule eroded over time and the Fifth Circuit has since repudiated it, holding that "an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial" so long as procedural safeguards are in place, *Cervantes-Pacheco*, 826 F.2d at 315-316. As Judge Williams acknowledged in dissent, the decisions supporting petitioner's argument "have long since been ignored if not abrogated or outright overruled." Pet.

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a cooperating witness based on "the 'overall quality' of any cases that had been developed"); *United States* v. *Kimble*, 719 F.2d 1253, 1255-1256 (5th Cir. 1983) (upholding a conviction based on the testimony of a cooperating witness's whose sentence reduction was contingent on "the adequacy of his cooperation"), cert. denied, 464 U.S. 1073 (1984); *United States* v. *Crim*, 340 F.2d 989, 990 (4th Cir. 1965) (per curiam) (rejecting a due process challenge where a testifying witness was to receive a level of compensation "later to be determined by responsible officials on the basis of an appraisal of the extent and quality of the [undercover] work").

App. 15. At present, only the First Circuit has expressed any constitutional doubts about witness fees dependent on a subsequent indictment or conviction, in dictum in a footnote twenty years ago. See *United States* v. *Dailey*, 759 F.2d 192, 201 n.9 (1st Cir. 1985) (suggesting that "such agreements skate very close to, if indeed they do not cross, the limits imposed by the due process clause"). That court's subsequent decision in *Cresta*, *supra*, makes clear, however, that it would uphold the admission of Diaz's testimony in this case.

The decision of the court of appeals does not implicate a circuit conflict, and is fully consistent with the decisions of this Court. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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